

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

STEFANIE JOLENE KING,)	
)	No. CV-10-03071-CI
Plaintiff,)	
)	ORDER GRANTING PLAINTIFF'S
v.)	MOTION FOR SUMMARY JUDGMENT
)	
MICHAEL J. ASTRUE, Commissioner)	
of Social Security,)	
)	
Defendant.)	

BEFORE THE COURT are cross-Motions for Summary Judgment. (ECF No. 17, 19.) Attorney D. James Tree represents Stefanie Jolene King Plaintiff); Special Assistant United States Attorney Leisa A. Wolf represents the Commissioner of Social Security (Defendant). The parties have consented to proceed before a magistrate judge. (ECF No. 7.) After reviewing the administrative record and briefs filed by the parties, the court **GRANTS** Plaintiff's Motion for Summary Judgment and **DENIES** Defendant's Motion for Summary Judgment.

JURISDICTION

Plaintiff protectively filed for Supplemental Security Income (SSI) benefits on August 31, 2007. (Tr. 12; 128.) She alleged disability due to depression, anxiety, and learning disability. (Tr. 95.) Her alleged onset date is August 31, 2007. (Tr. 96.) Plaintiff's claim was denied initially and on reconsideration, she requested a hearing before an administrative law judge (ALJ). (Tr. 41-47.) A video hearing was held on August 20, 2009, at which

1 Plaintiff, who was represented by counsel, testified. (Tr. 24-37.)
2 ALJ W. Howard O'Bryan, Jr., of Oklahoma City, Oklahoma, presided.
3 (Tr. 24.) The ALJ denied benefits on October 21, 2009, and the
4 Appeals Council denied review. (Tr. 3-5; 12-21.) The instant
5 matter is before this court pursuant to 42 U.S.C. § 405(g).

6 **STATEMENT OF THE CASE**

7 The facts of the case are set forth in detail in the transcript
8 of proceedings and are briefly summarized here. At the time of the
9 hearing, Plaintiff was 37 years old and living with a friend. (Tr.
10 26.) Plaintiff testified that her mother had custody of her
11 children for the past six years because upon separation from her
12 husband, she was not capable of caring for herself or her children.
13 (Tr. 32-33.) Plaintiff testified that she did not have a permanent
14 address because she could not "get financially stable" due to her
15 medical conditions. (Tr. 26.) She described her medical problems as
16 depression and anxiety. (Tr. 26-27.) Plaintiff completed the
17 tenth grade, and was attempting to obtain a GED. (Tr. 27-28.)
18 Plaintiff reported she was a stay-at-home mom for the first part of
19 her life and at one time, she worked for about 12 days at a cannery.
20 (Tr. 28.) She testified that she feels hopeless everyday, and two
21 or three days per week she stays in bed all day and night. (Tr.
22 30.) She reported that Wellbutrin gets her going in the morning,
23 and her other medicine helps her sleep at night. (Tr. 34.)

24 **ADMINISTRATIVE DECISION**

25 ALJ W. Howard O'Bryan, Jr., noted Plaintiff's application for
26 supplemental security income was filed August 31, 2007. (Tr. 12.)
27 At step one, he found Plaintiff had not engaged in substantial
28 gainful activity since the application date. (Tr. 14.) At step

1 two, he found Plaintiff had severe impairments of "depressive
2 disorder; dysthymia; and dependent personality disorder." (Tr. 14.)
3 At step three, the ALJ determined Plaintiff's impairments, alone and
4 in combination, did not meet or medically equal one of the listed
5 impairments in 20 C.F.R., Subpart P, Appendix 1 (20 C.F.R.
6 416.920(d), 416.925 and 416.926). (Tr. 14.) In his step four
7 findings, the ALJ found Plaintiff's statements regarding pain and
8 limitations were not credible to the extent they were inconsistent
9 with the RFC findings. (Tr. 18.) He found that Plaintiff retained
10 the RFC to perform a full range of work at all exertional levels
11 with the following non-exertional limitations:

12 [T]he claimant requires work in relative isolation with
13 limited contact with peers, supervisors, and the general
14 public. The claimant is able to remember, understand, and
15 carry out simple and some complex instructions and carry
out simple, routine tasks. The claimant can adapt to
changes in the work environment. The claimant is able to
sustain concentration necessary for unskilled work.

16 (Tr. 15.) ALJ O'Bryan found Plaintiff had no past relevant work.
17 (Tr. 20.) The ALJ found that considering Plaintiff's age,
18 education, work experience, and residual functional capacity, jobs
19 exist in significant numbers in the national economy that Plaintiff
20 can perform. (Tr. 20.) The ALJ concluded that the non-exertional
21 limitations have little or no effect on the occupational base of
22 unskilled work at all exertional levels. (Tr. 20.) The ALJ quoted
23 the basic mental demands listed in SSR 85-15 and concluded that
24 Plaintiff had no more than moderate limitations in any of the
25 functional areas, and thus was not under a disability. (Tr. 20-21.)

26 STANDARD OF REVIEW

27 In *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9th Cir. 2001), the
28 court set out the standard of review:

1 A district court's order upholding the Commissioner's
2 denial of benefits is reviewed *de novo*. *Harman v. Apfel*,
3 211 F.3d 1172, 1174 (9th Cir. 2000). The decision of the
4 Commissioner may be reversed only if it is not supported
5 by substantial evidence or if it is based on legal error.
6 *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999).
7 Substantial evidence is defined as being more than a mere
8 scintilla, but less than a preponderance. *Id.* at 1098.
9 Put another way, substantial evidence is such relevant
10 evidence as a reasonable mind might accept as adequate to
11 support a conclusion. *Richardson v. Perales*, 402 U.S.
12 389, 401 (1971). If the evidence is susceptible to more
13 than one rational interpretation, the court may not
14 substitute its judgment for that of the Commissioner.
15 *Tackett*, 180 F.3d at 1097; *Morgan v. Commissioner of*
16 *Social Sec. Admin.*, 169 F.3d 595, 599 (9th Cir. 1999).

17 The ALJ is responsible for determining credibility,
18 resolving conflicts in medical testimony, and resolving
19 ambiguities. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th
20 Cir. 1995). The ALJ's determinations of law are reviewed
21 *de novo*, although deference is owed to a reasonable
22 construction of the applicable statutes. *McNatt v. Apfel*,
23 201 F.3d 1084, 1087 (9th Cir. 2000).

24 It is the role of the trier of fact, not this court, to resolve
25 conflicts in evidence. *Richardson*, 402 U.S. at 400. If evidence
26 supports more than one rational interpretation, the court may not
27 substitute its judgment for that of the Commissioner. *Tackett*, 180
28 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579 (9th Cir. 1984).
Nevertheless, a decision supported by substantial evidence will
still be set aside if the proper legal standards were not applied in
weighing the evidence and making the decision. *Browner v. Secretary*
of Health and Human Services, 839 F.2d 432, 433 (9th Cir. 1988). If
there is substantial evidence to support the administrative
findings, or if there is conflicting evidence that will support a
finding of either disability or non-disability, the Commissioner's
determination is conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-
1230 (9th Cir. 1987).

SEQUENTIAL PROCESS

The Commissioner has established a five-step sequential evaluation process for determining whether a person is disabled. 20 C.F.R. §§ 404.1520(a), 416.920(a); see *Bowen v. Yuckert*, 482 U.S. 137, 140-42 (1987). In steps one through four, the burden of proof rests upon the claimant to establish a prima facie case of entitlement to disability benefits. *Tackett*, 180 F.3d at 1098-99. This burden is met once a claimant establishes that a physical or mental impairment prevents him from engaging in his previous occupation. 20 C.F.R. §§ 404.1520(a)(4), 416.920(a)(4). If a claimant cannot do his past relevant work, the ALJ proceeds to step five, and the burden shifts to the Commissioner to show that (1) the claimant can make an adjustment to other work; and (2) specific jobs exist in the national economy which claimant can perform. *Batson v. Commissioner of Social Sec. Admin.*, 359 F.3d 1190, 1193-94 (2004). If a claimant cannot make an adjustment to other work in the national economy, a finding of "disabled" is made. 20 C.F.R. §§ 404.1520(a)(4)(i-v), 416.920(a)(4)(i-v).

ISSUES

The question is whether the ALJ's decision is supported by substantial evidence and free of legal error. Plaintiff contends the ALJ improperly rejected the opinions of some medical providers, and ignored other medical provider opinions in crafting the RFC. Plaintiff also alleges that the ALJ erred by discounting Plaintiff's credibility and by failing to identify specific jobs, available in significant numbers, consistent with Ms. King's functional limitations. (ECF No. 18 at 9-20.) Defendant contends the ALJ's decision is supported by substantial evidence and free of legal

1 error. (ECF No. 20.)

2 DISCUSSION

3 1. **Other Medical Sources - Christopher J. Clark, M.Ed., LMHC;**
4 **Carmen Young, PA-C; Peggy Champoux, MSW.**

5 Plaintiff argues that the ALJ erred by failing to provide valid
6 reasons for rejecting the opinions of her treating "other source"
7 providers. (ECF No. 18 at 9.) In disability proceedings, a treating
8 physician's opinion carries more weight than an examining
9 physician's opinion, and an examining physician's opinion is given
10 more weight than that of a non-examining physician. *Benecke v.*
11 *Barnhart*, 379 F.3d 587, 592 (9th Cir. 2004); *Lester v. Chater*, 81
12 F.3d 821, 830 (9th Cir. 1995). If the treating or examining
13 physician's opinions are not contradicted, they can be rejected only
14 with clear and convincing reasons. *Lester*, 81 F.3d at 830. If
15 contradicted, the opinion can only be rejected for "specific" and
16 "legitimate" reasons that are supported by substantial evidence in
17 the record. *Andrews*, 53 F.3d at 1043.

18 Mr. Clark, Ms. Young and Ms. Champoux are not "acceptable
19 medical sources" who can provide evidence to establish a medically
20 determinable impairment. 20 C.F.R. § 404.1513(a). However, they do
21 qualify as "other sources" under 20 C.F.R. § 404.1513(d)(1), and
22 their opinions as to functional limitations resulting from an
23 established impairment must be evaluated and can be discounted only
24 by providing specific reasons, "germane" to the witness. SSR 06-03p;
25 *Stout v. Commissioner of Social Security*, 454 F.3d 1050, 1053 (9th
26 Cir. 2006).

27 In this case, the ALJ addressed only one of the three "other
28 source" opinions in the record: The assessment from Carmen Young,

1 P.A., a physician's assistant at Central Washington Comprehensive
2 Mental Health. The ALJ rejected her opinions because she was a
3 "non-acceptable medical source," and her findings were not "entirely
4 consistent with the clinical narrative progress treatment notes or
5 the overall evidence." (Tr. 19.) The record reveals that Ms. Young
6 completed a Mental Residual Functional capacity Assessment form on
7 July 24, 2009. (Tr. 378-80.) In the assessment, Ms. Young indicates
8 that Plaintiff is moderately limited in several non-exertional
9 categories. (Tr. 378-79.) Ms. Young ultimately concluded that
10 Plaintiff was not capable of full-time work, but she could likely
11 work part-time in the future. (Tr. 380.)

12 As the Plaintiff points out, the ALJ failed to identify
13 specific opinions or provide citations to the record that reveal
14 assessments that are inconsistent with Ms. Young's determination
15 that Plaintiff cannot work full time. (ECF No. 18 at 10-11.) The
16 narrative progress treatment notes from Central Washington
17 Comprehensive Mental Health indicate Plaintiff was depressed,
18 anxious, and at times overwhelmed, tearful, experiencing difficulty
19 with concentration, and plagued by sleep problems. (Tr. 256; 267-
20 68; 274-78; 289-90; 295-96; 301.) On independent review, no medical
21 evidence can be located from treating or examining providers in the
22 record that directly contradict Ms. Young's assessment. The mere
23 absence of a corroborating opinion does not constitute a conflict
24 among the medical opinions. *Widmark v. Barnhart*, 454 F.3d 1063,
25 1067 (9th Cir. 2006). Moreover, the ALJ's failure to specify
26 contradictory evidence is insufficiently specific to reject Ms.
27 Young's opinion. An ALJ's conclusory declaration that medical
28 opinions are "not supported by sufficient objective findings or are

1 contrary to the preponderant conclusions mandated by the objective
2 findings does not achieve the level of specificity our prior cases
3 have required." *Embrey v. Bowen*, 849 F.2d 418, 421-22 (9th Cir.
4 1988).

5 Additionally, the ALJ failed to address several "other source"
6 opinions. While an ALJ is not required to discuss every piece of
7 evidence, he may not omit evidence that is significant or probative.
8 *Howard v. Barnhart*, 341 F.3d 1006, 1012 (9th Cir. 2003). Such
9 omissions are harmless only where they are "inconsequential to the
10 ultimate nondisability determination." *Carmickle v. Comm'r*, 533
11 F.3d 1155, 1162 (9th Cir. 2008).

12 For example, the ALJ failed to address the December 30, 2004,
13 Psychological/Psychiatric Evaluation from Peggy Champoux, MSW,
14 Therapist. (Tr. 187-90.) Ms. Champoux found that Plaintiff was
15 markedly impaired in her abilities to exercise judgment and make
16 decisions, and to respond appropriately to and tolerate the pressure
17 and expectations of a normal work setting. (Tr. 189.)

18 The ALJ also failed to address the July 16, 2007,
19 Psychological/Psychiatric Evaluation from Christopher J. Clark,
20 M.Ed., LMHC, that assessed Plaintiff with several moderate
21 limitations in cognitive and social factors, and three marked
22 impairments in social factors. (Tr. 163-66.) Specifically, Mr.
23 Clark found Plaintiff had marked impairments in her abilities to
24 interact appropriately with public contacts, to respond
25 appropriately to and tolerate the pressure and expectations of a
26 normal work setting, and to control physical or motor movements and
27 maintain appropriate behavior. (Tr. 165.) Mr. Clark noted that
28 Plaintiff had long-term problems tolerating work-like settings and

1 staying on task. (Tr. 166.)

2 Because Mr. Clark and Ms. Champoux both provided opinions that
3 Plaintiff was markedly impaired in her abilities to adequately
4 function in the workplace and, therefore, contradict the ALJ's RFC
5 assessment, these opinions were significant and probative, and the
6 ALJ's failure to analyze these opinions was not harmless.

7 **2. Remand to develop the record.**

8 An ALJ's duty to develop the record further is triggered "only
9 when there is ambiguous evidence or when the record is inadequate
10 for proper evaluation of evidence." *Mayes v. Massanari*, 276 F.3d
11 453, 459-60 (9th Cir. 2001). In determining Plaintiff's RFC, the
12 ALJ relied upon the opinion of the State agency reviewing physician.

13 (Tr. 19.) However, a non-examining physician's opinion cannot by
14 itself constitute substantial evidence. *Widmark*, 454 F.3d at 1066

15 n.2. None of Plaintiff's treating physicians provided opinions
16 related to Plaintiff's non-exertional limitations. For example, on
17 June 28, 2004, James P. Rougle, D.O., performed a psychiatric
18 evaluation of Plaintiff. (Tr. 152-54.) He observed Plaintiff as
19 depressed and anxious, with fair insight and judgment, and
20 cognitively intact. (Tr. 153.) Dr. Rougle noted that Plaintiff's
21 sleep pattern and ability to concentrate were disrupted by her
22 anxiety and depression. (Tr. 153.) Dr. Rougle diagnosed Plaintiff
23 with generalized anxiety disorder, and depressive disorder NOS.
24 (Tr. 154.)

25 On September 8, 2006, Plaintiff was examined by Donald Hill,
26 M.D., for a followup related to Plaintiff's depression and anxiety.
27 (Tr. 383.) Dr. Hill "briefly reviewed" Plaintiff's chart and
28 refilled a prescription for Wellbutrin. (Tr. 383.) His diagnosis

1 was "depression and anxiety by history." (Tr. 383.)

2 On October 17, 2007, Plaintiff was examined by Sandy
3 Birdlebough, Ph.D., ARNP, of Central Washington Comprehensive Mental
4 Health. (Tr. 226-28.) Dr. Birdlebough observed that Plaintiff's
5 long and short-term memory appeared intact, she exhibited moderately
6 abstract thinking, her intellect appeared average, and her judgment
7 was fair. (Tr. 227.) Dr. Birdlebough found Plaintiff had a "fairly
8 long period of depressive symptoms, going back at least four to five
9 years, and probably longer than that." (Tr. 227.) Dr. Birdlebough
10 diagnosed Plaintiff with Major Depression, single episode, moderate,
11 dysthymia and dependent personality disorder. (Tr. 228.)

12 Because none of the treating physicians' opinions established
13 Plaintiff's non-exertional limits, remand is required. Medically
14 acceptable diagnostic techniques are required to establish a
15 disability. *Vincent v. Heckler*, 739 F.2d 1393, 1395 (9th Cir. 1984)
16 (citing 42 U.S.C. § 423(d)(3)).

17 Additionally, with regard to exertional limits, the ALJ failed
18 to address the June 19, 2007, Ahmend Tarique, M.D., opinion that Ms.
19 King was limited to a medium level of exertion due to carpal tunnel
20 syndrome. (Tr. 171.)

21 Since the state agency nonexamining consultants' opinions do
22 not constitute substantial evidence without other support, the
23 record is inadequate to assess Plaintiff's work-related non-
24 exertional limitations, as well as Plaintiff's exertional
25 limitations. Therefore, this matter must be remanded to the
26 Commissioner for additional proceedings.

27 CONCLUSION

28 Having reviewed the record and the ALJ's findings, this court

1 concludes the ALJ's decision is not supported by substantial
2 evidence and is based on legal error. Remand consistent with this
3 decision is necessary. Upon remand, the ALJ is directed to obtain
4 complete psychological and physical evaluations, which include an
5 assessment of Plaintiff's nonexertional mental limitations,
6 exertional limitations, and reassess Plaintiff's RFC and
7 credibility. The ALJ is further directed to make new step-four
8 findings in compliance with SSR 82-62 in light of the new RFC, and
9 if necessary, proceed to step five. Accordingly,

10 **IT IS ORDERED:**

11 1. Plaintiff's Motion for Summary Judgment (**ECF No. 17**) is
12 **GRANTED**. The matter is remanded to the Commissioner for additional
13 proceedings pursuant to sentence four 42 U.S.C. § 405(g).

14 2. Defendant's Motion for Summary Judgment (**ECF No. 19**) is
15 **DENIED**.

16 3. An application for attorney fees may be filed by separate
17 motion.

18 The District Court Executive is directed to file this Order and
19 provide a copy to counsel for Plaintiff and Defendant. Judgment
20 shall be entered for **Plaintiff** and the file shall be **CLOSED**.

21 DATED April 5, 2012.

22
23 S/ CYNTHIA IMBROGNO
24 UNITED STATES MAGISTRATE JUDGE
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